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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 857

UNITED STATES GYPSUM COMPANY, A CORPORATION,
Petitioner,

vs.

NATIONAL WAR LABOR BOARD, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To The Honorable The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Your Petitioner, United States Gypsum Company, a corporation, respectfully prays for a writ of certiorari to review the judgment herein of the United States Court of Appeals for the District of Columbia, which judgment reversed an order of the District Court for the District of Columbia overruling a motion of Respondents herein for a dismissal of the complaint herein and for summary judgment. (J. A. 95)[1]

1. "J.A." refers to the joint appendix in the court below, which constituted the printed record therein. It appears in the printed record in this court at pages 1-96. "R." refers to the record in the court below, which comprises pages 97-102 of the printed record in this court. The complete transcript of the record of the trial court has been filed in this court.

Opinions Below.

The opinion of the court below (R. 98-99) is reported in ..... U. S. App. D. C. ....., 145 Fed. (2d) 97.

There was no formal opinion by the District Court. The court's decision was announced from the bench upon the conclusion of the oral argument.

Jurisdiction.

The judgment of the court below was entered on October 23, 1944. (R. 100.)

The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code as amended. (Sec. 347(a), Ch. 9, Title 28, United States Code.)

Statement of the Matter Involved.

This suit was brought in the District Court for the District of Columbia to enjoin Respondents, the National War Labor Board and its members, and the Director of Economic Stabilization, and the Board of Economic Stabilization, and its members, from taking any action to compel Petitioner to comply with a Directive Order of the National War Labor Board entered on May 31, 1943, and for a judgment declaring the rights and legal relations of Petitioner with respect to such order.

At the outset it is important to bear in mind that the Respondent, National War Labor Board, prior to the commencement of this suit, construed said order as compulsory upon Petitioner, as constituting "compulsory arbitration" and specifically threatened to enforce said order, or cause the same to be enforced against Petitioner. The threats of enforcement specifically made in the course of the show-cause hearing on June 24, 1943 went to the extent of the

extinction of Petitioner's business if it did not comply with said order.

The assertion of Respondents that the Board's order was "advisory" only and did not fix or determine the legal rights of the parties was, so far as Petitioner is concerned, made for the first time after the present suit was brought, and is the exact opposite of the position taken by the Board before the commencement of the suit.

Petitioner's Warren, Ohio, plant, formerly engaged in the manufacture of metal lath, is now engaged in the manufacture of expanded metal grating, stair treads, platforms and other expanded metal specialties for use on merchant ships, warships, and tanks. (J.A. 7.)

There had been no interruption of work at the plant nor was any such interruption threatened or imminent among Petitioner's employees. (J.A. 7-8.)

Petitioner and the Union agreed upon all terms and conditions of employment except for the demand of the Union for a retroactive wage increase to May 20, 1942 (the date of expiration of the theretofore existing contract) and for maintenance of membership and check-off. (J.A. 8-10.) The Board, in its said Order of May 31, 1943, allowed the retroactive wage increase to July 20, 1942 and directed that Petitioner include in its labor contract with its employees the Board's standard clause for maintenance of membership and check-off. The maintenance of membership provision would require Petitioner to discharge any employee who withdraws or is expelled from the Union. The provision for check-off would require Petitioner to collect for the Union all Union dues and initiation fees due it. (J.A. 14-15.)

The Directive Order in question was mandatory in form. By it the Board "directs" (1) that the company "shall

make" the wage increase in question, and (2) that the provisions for maintenance of membership and check-off "shall be incorporated" in the contract between the parties. (J.A. 14.)

Petitioner paid the retroactive wage, leaving in dispute only the question of maintenance of membership and check-off.

By formal letter to the Board and upon hearing, Petitioner challenged the Board's order upon the ground that by requiring the inclusion of the said provisions for maintenance of membership and check-off, it invaded Petitioner's constitutional rights, and in addition required Petitioner to violate the National Labor Relations Act. (J.A. 16-18; 18-20.)

Following receipt by the Board of Petitioner's said letter the matter was set for hearing before the Board on June 24, 1943 by a telegraphic order upon Petitioner to show cause why it should not comply with the said order. (J.A. 18.) Apparently the real purpose of the show-cause hearing was specifically to make a matter of record the Board's contention that its order of May 31, 1943 was final, binding and compulsory upon Petitioner and that Petitioner would be required to comply therewith.

During the course of the hearing Wayne L. Morse, Compliance Officer of the Board, declared that its order was binding upon, and enforcible against Petitioner; that the Board had the power of "compulsory arbitration"; that the Board would urge the exercise of all of the war powers of the President as were necessary in order to enforce compliance and that the very life of the Board depended upon complete compliance and that defiance of the Board would not be permitted. Mr. Morse further stated at the hearing that it made no difference whether Petitioner remained in business or not if the choice the Government had

was to permit it to remain in business or to protect the no-strike, no-lockout policy of the Government; that the challenge to the Board must be met with all the forces of the Government necessary to meet it and that the Government was justified in taking the necessary time to compel compliance if the Board was to preserve the principles upon which the whole enforcement policy rested. (J.A. 20-23.)

Mr. Morse further, at the hearing, quoted from and specifically put into the record the Board's opinion in the so-called Little Steel case (1 W.L.R. 325), wherein it was specifically stated that there was no basis for questioning the power of the President to order what amounted to compulsory arbitration which he had entrusted to the Board, and that those who challenged the decision of the Board challenged the war powers of the President. It further appeared that in the Little Steel case the Board had said;

> "As Commander in Chief in time of war the President's authority extends not only to matters of strictly military nature or to the problems directly related to military activity, but also to whatever phases of civilian life must be controlled in order to prosecute the war successfully." (1 W.L.R. at p. 353.)

Reference was also made in the Little Steel opinion to the seizure of the properties of the *Toledo, Peoria & Western Railroad Company* (Case No. 48, 3 W.L.R. 518) for failure of that company to comply with an order of the Board with respect to which seizure the Board said that it had recommended that the properties be operated until such time as the company agreed to comply with the Board's decision. (1 W.L.R. at p. 358.) The Board's views thus expressed in the instant case were in precise conformity with its established policies and views as stated in other decisions, both before and after the decision here.

S. A. Woods Machine Company, 2 W.L.R. 159; *J. Greenebaum Tanning Co.*, 10 W.L.R. 527; and *U. S. Vanadium Company*, 13 W.L.R. 527. In the *Vanadium* case the Board said that it had the same power with respect to the settlement of labor disputes, and its orders were as binding and enforcible, prior to the enactment of the War Labor Disputes Act as after the enactment of that Act.

The Board's order has deprived Petitioner and its employees of the benefits of the labor contract embodying the terms and conditions of employment agreed upon between them. The declared construction by the Board of its said order, to the effect that the order was final, binding and compulsory, was enough to destroy Petitioner's employer-employee relationship with its employees. And, moreover, the threat inherent in the Board's order as thus construed by it has had the effect of depriving Petitioner of its right to conduct its business according to its free will and in accordance with law.

On June 25, 1943, the day after the show-cause hearing before the Board in the instant case, the War Labor Disputes Act was enacted over the President's veto. That Act gave legislative status to the National War Labor Board and authorized it, in the case of a labor dispute, "to decide the dispute and provide by order the wages and hours and all other terms and conditions (customarily included in collective bargaining agreements) governing the relations between the parties." The Act expressly provided, however, that in making any decision the Board should conform to certain statutes, including the National Labor Relations Act.

Under date of August 16, 1943 the President issued Executive Order No. 9370 entitled an order "authorizing the Economic Stabilization Director to take certain action in connection with the enforcement of Directives of the Na-

tional War Labor Board." It was provided in said order that in order to effectuate compliance with the Directive Orders of the National War Labor Board in cases which the Board reported to the Director of Economic Stabilization that its orders had not been complied with, the Director was "authorized and directed" to issue such Directives as he might deem necessary, among others "(a) to other departments or agencies of the Government directing the taking of appropriate action relating to withholding or withdrawing from non-complying employers any priorities, benefits or privileges extended, or contracts entered into, by executive action of the Government until the National War Labor Board has reported that compliance has been effectuated." (J. A. 29.)

Thereupon, on September 23, 1943, the complaint herein was filed. Without setting out the allegations of the complaint in detail, the complaint charged the issuance of the Board's order of May 31, 1943, the position of Petitioner taken with respect thereto, the holding of the show-cause hearing on June 24, 1943, the statements of the Board with respect to the compulsory effect of said order and the threats to enforce said order against Petitioner; the passage of the War Labor Disputes Act and the promulgation of Executive Order No. 9370. The complaint specifically charged that since the show-cause hearing "the Board has certified to or has reported to the President the fact that the Petitioner had declined and continued to decline to comply with the Board's said Directive Order of May 31, 1943" (J. A. 32); that the direction to the Director of Economic Stabilization embodied in the Executive Order of August 16, 1943 "was intended by the President as a specific direction to said Director of Economic Stabilization" to issue some one or more of the Directives specified in said Ex-

ecutive Order "against employers (including plaintiff) [Petitioner] who have not complied with the Directive Orders of the Board entered against such employers respectively." (J. A. 32.) It was then alleged that pursuant to such Executive Order the said Director of Economic Stabilization "is required to, will and is about to issue some one or more of the Directives specified" in said Executive Order "directed against plaintiff" (J. A. 32-3); that Petitioner, at its said Warren plant, enjoyed certain priorities, benefits and privileges of the nature referred to in said Executive Order which were necessary for the manufacture of the products at said plant and which, if withheld or withdrawn from Petitioner, would prevent its continued successful operation of said plant; and that the "said Board has reported to the said Director of Economic Stabilization" that Petitioner had not complied with the Order of May 31, 1943 "and said Director of Economic Stabilization and other departments or agencies of the Government unknown to plaintiff [Petitioner] but acting under the direction of said Director are about to, or have taken, action to withhold or withdraw" from Petitioner some or all of said priorities, benefits or privileges "for the sole purpose of compelling" Petitioner to accept said Order of May 31, 1943 "and will continue to do so unless restrained" by order of the Court. (J. A. 33.)

Respondents filed their motions to dismiss the complaint and for summary judgment. (J. A. 46.)

The motion to dismiss asserted that the Court lacked jurisdiction over the subject matter and also failed to state a claim against any of the defendants upon which relief could be granted. (J. A. 46.) The jurisdictional objection rested upon the contention (1) that no "controversy" existed sufficient to give the District Court jurisdiction, and (2) that the suit was against the United States.

On brief in the District Court and in the court below, Respondents urged, in support of their contention that the complaint failed to state a claim against them, or any of them, upon which relief could be granted, first, that Petitioner was not entitled to injunctive relief because it had failed to show that it had been or would be damaged irreparably by any action or threat of action by any of the Respondents; that the Board's order was "not self enforcing," and that the members of the War Labor Board in law and in fact were not charged with the enforcement of the order by employment of legal sanctions for failure to comply therewith. It was further urged that inasmuch as the complaint had charged that the War Labor Board had reported Petitioner's noncompliance to the President there was nothing further for it to do.

As to the Economic Stabilization Director, or the Economic Stabilization Board or its members, it was urged that none of them had threatened to enforce the Board's order, or to take any action against Petitioner for its noncompliance with such order; that the Economic Stabilization Director had disclaimed any power to invoke the sanctions specified in Executive Order 9370 in a case like the instant one, and that the functions of the Economic Stabilization Board were unrelated to Executive Order 9370, and in any event were purely advisory.

In support of its contention that Petitioner was not entitled to any declaratory relief it was urged again that there was no "case of actual controversy" between Petitioner and any of Respondents since, as it was said, the Board's order was not self enforcing and "did not fix or alter the legal rights of the parties." Furthermore it was urged that Executive Order 9370, for the reasons stated, did not apply to the Board's order here involved and there

had been no threats to apply against Petitioner any sanctions pursuant to Executive Order 9370.

It was further urged that inasmuch as the complaint challenged the validity of "compulsory arbitration" attempted to be put into effect by the executive branch of the Government, the validity thereof was not open to question inasmuch as the President himself was not a party to the suit. It was urged that the constitutional validity of Executive Order 9017, which created the National War Labor Board and the orders of the Board pursuant thereto, did not, therefore, present a "case of actual controversy."

In support of the motion for summary judgment Respondents filed the affidavit of Lloyd K. Garrison (J. A. 46-47) which incorporated in it a letter from the Director of Economic Stabilization to the Chairman of the National War Labor Board. (J. A. 48.)

The affidavit stated (J. A. 47) that the Board's order had been issued on May 31, 1943 prior to the enactment of the War Labor Disputes Act; that on August 16, 1943 the President had promulgated Executive Order No. 9370; that the Director of Economic Stabilization, in a letter dated October 13, 1943 to the Chairman of the National War Labor Board (a copy of which was annexed to the affidavit) had "expressed himself to the effect that his power to invoke the sanctions specified in Executive Order 9370 relates only to Directive Orders of the National War Labor Board issued pursuant to the War Labor Disputes Act of June 25, 1943"; and that "Consequently the Director of Economic Stabilization has neither threatened to take action, nor taken action, to compel compliance with the Directive Order of the National War Labor Board challenged in this action, which Directive Order was issued prior to the War Labor Board Disputes Act." (J. A. 47.) In the letter referred to (J. A. 48) the Director of Economic

Stabilization stated that he understood that some question had arisen as to the applicability of Executive Order 9370 to orders of the Board issued prior to the effective date of the War Labor Disputes Act; that the Executive Order must be read and interpreted in the light of the President's letter which accompanied its promulgation; and that the President had stated in his letter that Congress had intentionally left the enforcement of Board orders to executive action. The Vinson letter then stated that Executive Order 9370 was evidently designed to supply the executive action to which the President referred and that "It is reasonable therefore to infer that Executive Order 9370 relates only to Directive Orders of your Board issued pursuant to the provisions of the Smith-Connally Act." (J. A. 48.)

Petitioner filed opposing affidavits, first, showing the testimony of the Chairman of the Board and of Mr. Morse before a Special Committee of the House to the effect that they continued to assert that Board orders, whether entered pursuant to the War Labor Disputes Act, or under Executive Order 9017, were binding and compulsory upon the parties; that the terms and conditions of employment determined upon by the Board were imposed upon the parties without their volition and that the provision for maintenance of membership was not in violation of the National Labor Relations Act. (J. A. 50-77.) According to their testimony as shown by the affidavits, the Board, speaking through its said members, seemed to think that any question as to a violation of an employer's constitutional rights or as to whether the provision for maintenance of membership was in violation of the National Labor Relations Act, were matters to be passed upon by the Courts (J. A. 56), but that nevertheless the Attorney General in the in-

stant case had objected to the jurisdiction of the District Court to determine such questions. (J. A. 66-67; 71.) Mr. Morse had also testified that in the *Windsor* case the Board had attempted to get other Government agencies to impose sanctions against that company for failure to comply with the Board's order. (J. A. 69.) However, Mr. Morse also said that he thought that the question as to whether the President had exceeded his war powers is open to review and that if such a question could not be reviewed, "we would be confronted with a dictatorship." (J. A. 72.)

The affidavits further referred to the proceedings against the *S. A. Woods Machine Company* (J. A. 78-90), including the seizure thereof and certain proceedings directed against the *Twentieth Century Brass Works* for its refusal to comply with an order of the Board. (J. A. 91-93.)

The District Court overruled Respondents' motions without formal opinion. (J. A. 95.) Upon special appeal to the Court below (J. A. 95) the order of the District Court was reversed (R. 100). The cause was remanded to the District Court for further proceedings not inconsistent with the Court's opinion (R. 100).

The Court below summarily disposed of the case on the ground that it was ruled by its decision in *Employers Group of Motor Freight Carriers* v. *National War Labor Board*, 79 U. S. App. D. C.—143 Fed. (2d) 145. Undoubtedly, the Court's decision in the instant case was influenced by denial of certiorari on October 9, 1944 in that case. The only difference which the Court could see between the instant case and the *Motor Carriers* case was, according to the opinion, that in the instant case the complaint alleged that non-compliance had been reported to the

Director of Economic Stabilization and to the President, whereas in the *Motor Carriers* case the allegation was that the Board "might make such reports." (R. 98-99.) Also, by way of footnote, it was said, upon the authority of the *Ward* case, that the allegations in the complaint that the Director of Economic Stabilization and unnamed agencies of the Government were about to, or had taken, action to withhold priorities, etc. from Petitioner, were a mere prediction without legal effect. (R. 99.)

The effect of the judgment of the court below is that although the Board's action was claimed by the Board at the time of the commencement of the suit to be binding and compulsory upon Petitioner, and Petitioner was being subjected to specific threats of the enforcement of the order against it, even to the point of the extinction of its business, Petitioner is left wholly without protection even though the Board's order, in its fullest and most literal sense, was "advisory". An explicit threat to enforce the order, even though advisory—even as in a case of a specific threat to enforce an unconstitutional statute—would seem to require the protective processes of the Court, at least to the extent of a judgment declaring the rights, relations, and liabilities of the party against whom the challenged order is directed, with respect to such order. And if as a matter of law, or construction, Executive Order No. 9370 is inapplicable to an order of the Board entered prior to the enactment of the War Labor Disputes Act, and therefore inapplicable in the case of the order here involved, it would seem that Petitioner was entitled to a judgment so declaring, not to an outright dismissal of its complaint.

By requiring a dismissal of the complaint *in toto* Petitioner is left wholly without protection against the threatened, unlawful and illegal action of the Respondents.

Up to the present time, of course, the District Court has been afforded no opportunity to pass upon any of the substantive questions involved—even though Respondents' motion to dismiss the complaint admits the allegations thereof for the purpose of the motion. Specifically, there has been no judicial determination by the District Court as to whether Petitioner may be required to enter into any particular contract at all, or whether it may be compelled to agree to the provision of maintenance of membership or to the provision for check-off, or whether the provisions for maintenance of membership and check-off are, or are not, in direct violation of the National Labor Relations Act. The mere holding of the court below that the Board's order was "advisory" settles none of these questions, if, as is the case, Respondents nevertheless have threatened, and for aught that appears, intend to enforce the order against Petitioner, if not in one way (by judicial action) then in another (by executive action)—either by way of plant seizure or by the imposition of sanctions as provided for in Executive Order No. 9370.

Petitioner is constrained to observe that no matter how the court below has seen fit to characterize the Board's order in its opinion herein and in its opinion in the *Motor Carriers* case and in the *Ward* case, the Government obviously feels no constraint therefrom in the face of the dismissal of Petitioner's complaint herein. Respondents still regard the order as binding upon Petitioner and enforcible against it by whatever species of executive action the Executive Branch of the Government sees fit to invoke.

And notwithstanding what is said by Mr. Garrison and Mr. Vinson concerning Executive Order No. 9370 and no matter how the court below construed that order in the *Motor Carriers* case as not being applicable to orders of the Board entered prior to the enactment of the War Labor

Disputes Act, there is nothing in the present record which precludes the application of Executive Order No. 9370 to the instant case, or affords any protection to Petitioner against such executive action if its complaint herein is to be dismissed and it is to be denied even the protective influence of a declaratory judgment.

Some additional detail appears in the statement in the accompanying brief, to which reference is hereby had.

Questions Presented

1. Where the National War Labor Board entered its order against Petitioner, mandatory in form, and, as a part of the record in the case, specifically asserted that the order was binding and compulsory upon Petitioner, and threatened its enforcement against Petitioner, did Petitioner have the right to apply to the District Court for relief either by way of injunction or by way of a declaratory judgment declaring the rights and other legal relations of Petitioner with respect to such order?

2. Does the mere fact that after the commencement of the suit Respondents claimed that the order was advisory only and did not fix the legal rights of the parties prevent Petitioner from securing the relief sought?

3. Does the mere fact that the court below has held the Board's orders to be "advisory" justify the dismissal of Petitioner's complaint, which dismissal will deny Petitioner any right to the relief sought by its complaint and will leave it wholly without protection against the threatened enforcement of the order?

4. Even if the Board's order were only "advisory", should Petitioner's complaint be dismissed in the face of the Board's specific threats of enforcement, or is Peti-

tioner not entitled at least to a judgment declaring its rights and legal relations with respect to the order?

5. What is the essential nature of the Board's orders? Can they be merely "advisory" and at the same time enforcible by executive action? Or, if the order is enforcible in any way or by any means, was not Petitioner entitled to a judicial determination by the District Court as to whether the order violated its constitutional rights, or required it to enter into a contract specifically in violation of the National Labor Relations Act? Is not the order under such circumstances reviewable?

6. Is the present suit, thus seeking a judicial determination of said questions, a suit against the United States?

7. Does the complaint herein seeking a judicial determination of such questions state a claim or cause of action? Did the complaint show the existence of a "controversy" sufficient for purposes of federal court jurisdiction?

8. Did the complaint herein state a claim or cause of action when it asserted the entry of the Board's order of May 31, 1943 and specifically charged that the Director of Economic Stabilization had or was about to impose some or all of the sanctions designated in Executive Order No. 9370 in order to compel compliance by Petitioner with the Board's said order?

9. Did the Garrison affidavit, either with or without the Vinson letter, present any evidentiary matter for the consideration of the court?

(1) Were the following statements in the Vinson letter:

> "Evidently, therefore, Executive Order 9370 was designed to supply this executive action to which the President referred, and which was necessitated by the passage of the War Labor Disputes Act.

"It is reasonable, therefore, to infer that Executive Order No. 9370 relates only to Directive Orders of your Board issued pursuant to the provisions of the Smith-Connally Act."

and the statement in the Garrison affidavit relative to the Vinson letter:

"Consequently the Director of Economic Stabilization has neither threatened to take action, nor taken action, to compel compliance with the Directive Order of the War Labor Board challenged in this action, which Directive Order was issued prior to the enactment of the War Labor Disputes Act,"

matters of fact or other evidentiary matter, or were they merely conclusory, affording no basis whatsoever for a motion for summary judgment?

10. Was the court below in error in holding that the allegations of the complaint that the Director of Economic Stabilization—

"has or is about to issue some one or more of the Directives specified in paragraphs (a), (b), and (c) of Executive Order 9370"

and that—

"The said Director of Economic Stablilization and other departments or agencies of the government unknown to plaintiff [Petitioner] but acting under the direction of said Director, are about to or have taken action to withhold or withdraw from plaintiff [Petitioner] some or all of said priorities, benefits, or privileges for the sole purpose of compelling plaintiff [Petitioner] to accept said Directive Order of May 31, 1943, and will continue to do so unless restrained by order of this court,"

constitute a mere prediction without legal effect and do not constitute statements of fact?

11. Was the court below in error in reversing the order of the trial court denying Respondents' motions to dismiss the complaint and for summary judgment, thereby in effect

directing the granting of such motions, without at least a direction that there be a determination by at least a declaratory judgment of the non-binding effect of the Board's order, and of what the rights and relations of Petitioner were with respect to such order? Or, should not the court below, in its remanding order have given a specific direction to the District Court as to what further order should there be entered?

Reasons for Granting the Writ.

1. Notwithstanding denial of certiorari in *Employers Group of Motor Freight Carriers, Inc., et al.* v. *National War Labor Board, et al.*, No. 350, this term, and in *Montgomery Ward & Co., Inc.* v. *National War Labor Board, et al.*, No. 538, this term, certiorari should be granted in the instant case. Denial of certiorari in those cases imports no opinion on the merits thereof. *United States* v. *Carver*, 260 U. S. 482. See also *Higgins* v. *Smith*, 308 U. S. 473, where it appeared that this court had denied certiorari in numerous cases involving the question, although the decisions therein were found ultimately to be erroneous. See also *Avery* v. *Commissioner*, C. C. A. 7, 84 Fed. (2nd) 905, certiorari denied 299 U. S. 604, and *Lockhart* v. *Commissioner*, C. C. A. 3, 89 Fed. (2nd) 143, certiorari denied, 302 U. S. 7, 11, although subsequently the decisions of the courts of appeals were deemed erroneous. *United States* v. *Pleasants*, 305 U. S. 357. And see also *Hamilton Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251.

Rule 38 (5) (c) of this court provides that:

> "Certiorari may be granted where the United States Court of Appeals for the District of Columbia has decided a question of general importance, or a question of substance relating to the construction or application of the Constitution or a treaty or statute of the

> United States which has not been, but should be, settled by this court; or where that court has not given proper effect to an applicable decision of this court."

Apart from the provisions of the remainder of Rule 38, the provision above quoted justifies the granting of the writ in the instant case.

The situation which has resulted from the characterization by the court below of Board's orders being merely "advisory" has created an intolerable situation in view of the fact that Respondents, and the Government itself, through its Executive Branch, still treat the orders as binding and compulsory upon the employer and propose to enforce them, and continue to enforce them, by whatever executive action they see fit to invoke. Assuming the court below regards orders of the Board as of precisely the same character as those of the Old Railroad Labor Board,[2] and although this Court, in the second of the Pennsylvania cases,[3] said that the orders there involved were not enforcible in "any way" (267 U. S. 203 at p. 216), Respondents still insist, contrary to the apparent views expressed by the court below, that the orders of the Board are compulsory and enforcible. And, in the instant case, it appears that the Board itself, as part of the record of the case, specifically threatened Petitioner with the enforcement of the order to the point of the extinction of Petitioner's business if it did not comply.

The order of the court below in the instant case reversed the District Court and simply remanded the cause for further proceedings not inconsistent with the court's opinion. Substantially the same type of order was entered in the *Ward* case. In those two cases the District Court had denied motions for a dismissal of the respective complaints and for summary judgment. In the *Motor Carriers*

2. *Pennsylvania Railroad* v. *Labor Board*, 261 U. S. 72; and *Pennsylvania Railroad System, etc.* v. *Pennsylvania Rd. Co.*, 267 U. S. 203.

3. 267 U. S. 203.

case, however, 79 U. S. App. D. C. ....., 143 Fed. (2) 145, the District Court had granted the motions to dismiss and for summary judgment, without differentiation between the two motions, and the Court below there affirmed. We can only assume, therefore, that the "further proceedings" directed by the Court in the instant case were to be a general order of dismissal of the complaint.

Notwithstanding its orders in these three cases the court below, nevertheless, passed upon the questions involved in the suits at least to the extent of saying that the Board's orders, whether entered before or after the enactment of the War Labor Disputes Act were "advisory." To that extent the Court would seemingly have sustained the jurisdiction of the District Court as against the jurisdictional grounds urged in support of the motions to dismiss. To that extent, it would seem that there should at least have been entered a judgment under the Declaratory Judgments Act declaring the rights of Petitioner with respect to the Board's order.

Was there, or wasn't there, a controversy between Petitioner and Respondents at the time of the commencement of the suit? If the court below was of the opinion that there was no controversy because the order was "advisory" and therefore not reviewable,[4] the decision, under the circumstances of the instant case, is clearly opposed to innumerable decisions of this court where a controversy has been held to exist. See particularly *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227; *Stark* v. *Wickard*, 321 U. S. 288.

In the *Ward* case (79 U. S. App. D. C. ....., 144 Fed. (2d) 528) the Court's decision rested in part upon the point that it was said the complaint did not state "the

4. *Employers Group of Motor Freight Carriers, Inc.* v. *National Labor Relations Board*, 79 U. S. App. D. C. ....., 143 Fed. (2d) 145, which the court below in the instant case said was controlling.

form, substance, time, place, or circumstances of any threat. We must not ignore the possibility that if the complaint meant to allege threats it would say what form they took and when and to whom they were made. We understand the complaint to mean not that all 22 of the defendants, or any of them have made threats, but that the plaintiff considers the situation threatening." (144 Fed. (2d) 528 at p. 531.) In the instant case the opinion ignores all of the allegations of the complaint with respect to the specific threats made by the Board against Petitioner, so that while in the Ward case the presence or absence of threats was deemed important, the presence of specific threats in the instant case seems to have become unimportant.

Likewise, in the same way, in the *Motor Carriers* case (79 U. S. App. D. C. ....., 143 Fed. (2) 145) it was said that there "no one threatens and no one could maintain either judicial or administrative proceedings against the appellants upon the authority of the Board's order. In these circumstances there is no occasion for review of the Board's order." (143 Fed. (2d) 145 at p. 147.) Whatever the court saw fit to say to the effect that no one "could maintain * * * administrative proceedings against the appellants upon the authority of the Board's order" the fact remains, and is a matter of public knowledge, that the Board and the executive branch of the Government and its chief law officer not only assert that administrative proceedings may be maintained against noncomplying employers, but they are actually employing such administrative proceedings—by plant seizure, or by action such as Executive Order No. 9370—upon the authority of the orders of the Board and to enforce compliance therewith.[5]

5. And the court will recall that Mr. Morse himself testified that in one case—the Winsor case—the Board had endeavored to induce other Government agencies to withdraw priorities and the like from that company because of its failure to comply with the Board's order. Under such circumstances it is idle to say that "there is no occasion for review of the Board's order."

Furthermore, it was said in the *Motor Carriers* case (143 Fed. (2d) 145 at p. 150) "The Board has not reported or threatened to report appellant's failure to comply with its order." The complaint in the instant case specifically alleges that the Board had certified or reported to the President Petitioner's refusal to comply with the order. (J. A. 32.) Obviously, Respondents' motion to dismiss admits this allegation and there is no adequate affidavit filed whatsoever in support of the motion for summary judgment denying said allegation. The only affidavit filed in support of such motion was the Garrison affidavit which, although utterly insufficient for the purpose intended, dealt only with the applicability of Executive Order 9370.

The questions presented in the *Motor Carrier* case were totally different from those in the instant case. In the *Motor Carriers* case plaintiffs were attempting to prosecute a sort of appeal to the court for a review *on the merits* of the Board's order. That case involved only a question of wage increase and no claim was made, as we understand it, of any invasion of constitutional right or, specifically, that the employer there was being required by the Board's order to act in palpable violation of the National Labor Relations Act. In the instant case the Board's order requires Petitioner, as it claims, not only to enter into a specific contract with its employes, but to include in that contract provisions which are in direct and palpable violation of the National Labor Relations Act. In other words, Petitioner is being required by the Board's order to do the very thing in principle that this court in the *Wallace* and *Richwood* cases[6] said an employer could not be required to do.

In the *Ward* case the application for certiorari was founded principally upon the contention that Board orders

6. *Wallace Corporation* v. *N. L. R. B.*; *Richwood etc. Union* v. *N. L. R. B.*, Nos. 66-67 (this term—U. S.—decided Dec. 18, 1944.

under the War Labor Disputes Act were binding orders fixing the legal rights of the parties concerned—differing in this regard from the orders of the old Railroad Labor Board. However it was also urged that the Board could be enjoined from failing to comply with the procedural requirements of the War Labor Disputes Act. These are not the questions presented in the instant case, nor are those contentions advanced in support of certiorari here. Here the Board's order was entered wholly without legislative sanction, was asserted by the Board to amount to compulsory arbitration, and specific threats of enforcement were made by the Board. Whether advisory or not Respondents proposed to enforce the order against Petitioner, and hence Petitioner came into court for relief. The judgment below is to deny any relief to Petitioner, leaving Petitioner liable to any enforcement action any of Respondents or any other person may see fit to institute—wholly without protection. As a matter of fact the opinion of the court below is no part of the *judgment*, and the judgment is to be one of dismissal of the complaint. For Respondents to deal with the Board's order as compulsory would be no violation of either the *judgment* of the court below or of the judgment of the District Court entered pursuant to the mandate of the court below.[7]

7. In 33 C. J. at p. 1104, it is said: "* * * The reasons assigned by the court for the judgment entered do not constitute a part of the judgment. Therefore a judgment or decree of the court controls the written opinion, and if they are at variance, the former prevails and determines the rights of the parties." In respect of this last statement there are cited *Harriman* v. *Northern Security Co.*, 197 U. S. 244; *Abraham* v. *Casey*, 179 U. S. 210.

In 21 C. J. S., at p. 414, it is said that an opinion "cannot prevail against the final order or decision." See also *Stone* v. *United States*, 164 U. S. 380 at p. 383; *United States* v. *Shoshone Tribe*, 304 U. S. 111; *United States* v. *Wells*, 283 U. S. 102.

Unquestionably a court may look to an opinion of another court for certain purposes. But in the final analysis the judgment is controlling. Cf. *M. E. Blatt* v. *United States*, 305 U. S. 267. It must follow then as a matter of necessity that in case of conflict the judgment and not the opinion controls. We again point out, therefore, that the characterization by the court below of the Board's order as being advisory gives no protection to Petitioner against the judgment dismissing its complaint.

Whatever may have been the situation in the *Motor Carriers* case and in the *Ward* case, the record in the instant case would seem to preclude any out-and-out dismissal of Petitioner's complaint and would seem to require at least the entry of a declaratory judgment. Coming up as these questions of practice and procedure do in the instant case, and inasmuch as they not only involve but destroy the constitutional rights of Petitioner, certiorari should be granted under other explicit provisions of Rule 38. Subdivision (5)(b) of the Rule mentions cases where a circuit court of appeals "has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court." And requiring an out-and-out dismissal of Petitioner's complaint in the face of threatened enforcement of the order, no matter what may be the character of the order—advisory or not—it may also be said that the court below "has so far departed from the accepted and usual course of judicial proceedings" as to call for an exercise of this court's power of supervision.

Is it conceivable that had the Declaratory Judgment Act been in effect at the time the Old Railroad Labor Board cases came before this Court, this Court would not have directed the entry of some sort of a judgment declaring the rights of the railroads with respect to the orders of the Board? Or, had it appeared that the Board there had not only entered orders against the railroads but was asserting their compulsory effect upon them, and was threatening the roads with the enforcement of the order, is it conceivable that this Court would have put the railroads out of court with a dismissal of their complaint and would have denied them any relief whatsoever against the threatened, illegal action of the Board? Of course under the old

equity practice a decree dismissing a complaint for want of equity was a determination against the complainant on the merits. But although a complaint is dismissed it makes a large difference as to the reasons for the dismissal. Cf. *Utah Fuel Co.* v. *Bituminous Coal Commission*, 306 U. S. 56.

Even if an administrative order is unenforcible in law, or "advisory", if the administrative officials concerned assert its compulsory effect and threaten its enforcement, it would seem to us that without question the party against whom such order is directed and who is being threatened with its enforcement has the right to resort to the courts so that he may be adequately protected by the protective processes of the Judicial Branch of the Government against the unlawful action of the administrative officers concerned.

Coupled with all this it is now perfectly apparent, if it wasn't at the time made clear to the courts below, that it is not Respondents' contention that the Board's order is merely "advisory"—meaning thereby wholly unenforcible in any way, at any time, in any place, or by anybody, as in the old Railroad Board cases—but rather that the Board's order is in law binding and compulsory upon the employer and may be enforced against him, by *executive* action, if not by judicial process.

In May and June, 1944, a Select Committee was appointed by the House to investigate the seizure of Montgomery Ward & Company. The report of that Committee, containing the testimony before it and its findings, is now a public document. There appears from the testimony, not only of the Chairman of the National War Labor Board, Mr. Davis, and of Mr. Morse, the Board's Compliance Officer, but also of the chief law officer of the Government, that they still claim that the orders of the Board in law constitute a species of compulsory arbitration, that they are

binding upon the parties and are enforcible by executive action. The distinction there taken seems to have been that the Board orders were not enforcible by judicial action, but that they were enforcible by executive action, even though "lip service" is given to the proposition that an employer would have the right to come into court and have the court determine whether his constitutional rights have been invaded and that the court would have jurisdiction to make such determination. (Report, p. 37.)

It was also recognized, however, that plant seizure was but one species of executive action that might be employed to enforce compliance on the part of the employers, albeit, the only speices available to compel compliance by the union (Report, p. 54), but that there were other species of executive action to compel compliance by the employer. Obviously, Executive Order No. 9370 and the imposition of sanctions pursuant thereto is another such species of executive action.

We also think that because of the public interest here involved and the importance of the questions presented, the court can take judicial notice, namely, that the Government has but just now seized the Ward plants in Chicago and has filed suit in the District Court there for a determination, among other things, of the right of the Government to make such seizure to enforce conformity with the Board's Order.[8]

8. It is true that the seizure is also sought to be justified under the provisions of the War Labor Disputes Act. Nevertheless, the Government is put to its other alternative of justifying the seizure apart from the War Labor Disputes Act because of the limited character of that Act with regard to seizures. The Government's complaint there specifically states that there is a valid, existing, substantial controversy with respect to the rights of the parties. How can it be claimed in the instant case that the Board's order and its threatened enforcement against Petitioner presents no justiciable controversy?

The material parts of the current seizure order in the *Montgomery Ward & Company* case are as follows:

"Whereas, * * * in the exercise of the authority conferred upon it by the War Labor Disputes Act, the National War Labor Board

We want it distinctly understood that in referring to the current Ward seizure we are not litigating their controversy. We do think, however, that this court, upon the present application, is entitled to know the positions of the parties hereto with respect to the character of the Board's orders. And the same comment applies with respect to our reference to the testimony of the Board officials and of the Attorney General before one or the other of the House committees with respect to such matters, and particularly with reference to their asserted right to enforce such orders by administrative or executive action.

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has issued directive orders deciding the labor disputes that gave rise to the said disturbances; that the said directive orders provide terms and conditions of a kind customarily included in collective bargaining agreements to govern the relations between the parties to such disputes; * * * that Montgomery Ward & Co., Incorporated, has refused to put into effect the terms and conditions contained in these directive orders; that as a result of the refusal of Montgomery Ward & Co., Incorporated, to put into effect the terms and conditions contained in the directive orders issued by the National War Labor Board in the dispute in the plants and facilities of Montgomery Ward & Co., Incorporated, in Detroit, Michigan, a serious strike involving approximately 1800 employes is now in progress in that city. * * *.

"Whereas, * * * the preservation of the wartime structure of labor relations and the prevention of interruptions of war production depend upon the peaceful settlement of labor disputes by the War Labor Board in the manner provided for by the Congress * * *, that the persistent refusal of Montgomery Ward & Co., Incorporated, to put into effect the terms and conditions contained in directive orders issued by the National War Labor Board pursuant to the War Labor Disputes Act threatens to destroy both the wartime structure of labor relations and the procedure established by the Congress for the peaceful settlement of wage disputes during the war, and unduly impedes and delays the war effort, and

* * * * *

"Whereas, * * * the National War Labor Board has considered those disputes and issued directive orders determining and providing methods for their adjudgment; that the labor unions involved have expressed their willingness to adjust the disputes in accordance with the directive orders of the National War Labor Board, but Montgomery Ward & Co., Incorporated, have persistently refused to accept the provisions of the directive orders as a basis for the adjustment of such disputes; and that this refusal unduly impedes and delays the successful prosecution of the war,

NOW, THEREFORE * * * it is hereby ordered as follows:

"1. The Secretary of War is hereby authorized and directed * * * to take possession of the plants and facilities of Montgomery Ward & Co., Incorporated, * * *."

Is such order anything but a thinly veiled order of seizure for the express and sole purpose of enforcing compliance with the Board's order, which apparently the court below in its decision in the *Ward* case said was advisory and need not be obeyed by the company?

The Attorney General, in his testimony before the Committee, left no question of doubt as to the Government's position with regard to the enforcibility of Board orders. While he was there addressing himself particularly to the War Labor Disputes Act, he nevertheless stated explicitly, "if the War Labor Board is not obeyed, then the Executive has the right to take over the plants specifically," (Report, p. 142) and "to enforce them [Board orders] the President has the power to seize." (Report, p. 143.)

This Court has never passed upon the precise question which is involved in the instant case. The matter involved is of wide public importance and the consequences of the decision below are of sweeping importance. The lack of any final and conclusive answer by this court to the problems involved has created an intense feeling of unrest and fear on the part of the public at large that acts of the Government—without even the semblance of legislative sanction—will be permitted to go unchecked and uncontrolled, and that the private citizen, although he is supposed to be living under a constitutional government, is to be denied access to the courts for a judicial determination of his belief that his constitutional rights are being destroyed.

Of what avail is it to the citizen to be told by a reviewing court that the Board's order is "advisory" when the executive branch of the Government, with all of the powers of the military behind it, tells him that it is binding upon him and that if he does not obey, his property will be taken from him by force, or his business will be destroyed?

This court in the very hard cases involving detentions of and restraints upon American citizens of Japanese ancestry, has firmly adhered to the principle that the protective processes of the courts will be extended even to them, and that even in time of war the Constitutional guaranties to the citizen must be observed. What must be the situation

in cases like the instant case where citizens are denied relief notwithstanding their constitutional rights have been flagrantly trampled upon by administrative action of the Government. As we have said, even Mr. Morse, in his testimony before the Select Committee above referred to, had the grace to say that unless a citizen had the right to have his constitutional rights passed upon by the courts we would have a dictatorship. He knew whereof he was speaking.

The District Court attempted to protect Petitioner to the extent of hearing its claim. The court below denies that protection to Petitioner. If, upon a claim of constitutional right, judicial processes fail or are denied, what then is left to the citizen but to meet force with force? A lawless citizen can be controlled or punished. A lawless government is above any orderly or corrective process.

What is to happen then if, by denying access to the courts, constitutional government is subverted and destroyed?

Whatever this court may think of Petitioner's claim of constitutional privilege, and whether it is held right or wrong in its claim, it is essential that this court decide whether Petitioner has the right, at least, to be heard.

It is intolerable that the courts should lend themselves to a situation where, in the one breath, before the court, it is contended that the Board's order is advisory only, for the purpose of avoiding any judicial restraint upon administrative action, and in the next breath, out of court, it is contended that the Board's order is enforcible by executive action and that the employer, Petitioner here, is to be denied the protective processes of the Judicial Branch of the Government as against the specific threats of enforcement of the order.

As stated, Petitioner's complaint, under the judgment of the court below, is to be dismissed. Where law enforcement officers threaten a citizen with the enforcement of a statute which they admit to be unconstitutional, is the citizen to be denied protection against such threatened action merely because the officers themselves admit such unconstitutionality? Such concession on their part would seem to require the entry of a decree—not the dismissal of the complaint. How does such a case differ from the instant case?

2. This case involves questions of vast public importance. It is proper that this court pass upon the question of the applicability of the Declaratory Judgments Act to a case like the present. It is being urged by Respondents that the case presents no "controversy." In *Aetna Life Insurance Company* v. *Haworth*, 300 U. S. 227, certiorari was granted for the sole purpose of determining whether or not the matters there involved presented a controversy under the Declaratory Judgments Act. There is even greater reason in the instant case to grant certiorari so that the question may be conclusively determined. The Declaratory Judgment Act authorizes a judgment declaring the rights and legal relations of the plaintiff, wholly without regard to whether other relief may or may not be had. (U. S. C. Title 28, § 400(1); Rule 57.) All that is necessary to entitle a plaintiff to relief by way of declaratory judgment is that there be "an actual case or controversy", that the issue be "actual and adversary", and that the judgment is not a "medium for securing an advisory opinion in a controversy which has not arisen." *Coffman* v. *Breeze Corporations, Inc. and U. S.* No. 71, this term, decided January 2, 1945 ..... U. S. ....., and cases cited therein.

Respondents herein asserted in the District Court that no controversy existed. The court below has directed the

dismissal of Petitioner's complaint. Obviously the court below has held against the entry of a declaratory judgment. In so doing, it has palpably failed to follow the decisions of this court.

3. In view of the vast public importance of the questions and matters presented, and in view of the position taken by Respondents and by the Government through its Executive Branch that Board orders are enforcible, this Court should determine whether or not such orders do or do not constitute "compulsory arbitration" and if so, whether such compulsory arbitration can be made effective in time of war by the Executive Branch of the Government acting without legislative authority, and whether or not, if such "compulsory arbitration" is valid, the employer can be required to enter into a contract in specific violation of the National Labor Relations Act. Or, if because of lack of opportunity as yet for a decision of these questions by the District Court this Court is unwilling at this time to determine such questions, then it is respectfully submitted that certiorari should be granted, the judgment of the court below should be reversed and the cause should be remanded to the District Court for a determination of the issues raised by the complaint. It is no answer to the present application for certiorari that the court below has said that the Board's order was advisory—not when Respondents claim that the order is enforcible by administrative or executive action. By requiring a dismissal of Petitioner's complaint the practical effect of the judgment of the court below is to sustain as valid orders of the Board which in all reality constitute "compulsory arbitration awards" although they are called "advisory"—and to sustain such orders as valid where they are issued solely under the direction and powers of the executive branch of the Government, wholly without legislative sanction. In this regard the importance

of the question presented is more basic than that in the *Ward* case, had that case directly challenged the constitutionality of the War Labor Disputes Act as providing for compulsory arbitration. While the War Labor Disputes Act was there involved, the petition for certiorari raised no direct question as to the invalidity of the statute itself. The petitioner there urged that the statute provided for enforcible orders, but that whether the Board's orders were enforcible or merely advisory the Board's failure to follow the procedural requirements of the Act could be enjoined. The instant case presents an entirely different question. Here we have an assertion that the executive branch of the Government acting alone may exercise in time of war all of the war powers otherwise vested in the National Government as such. If the executive department, acting through the National War Labor Board, can effectuate a system of compulsory arbitration, and if its orders are enforcible by administrative or executive fiat, and if the executive branch of the Government can declare and establish a national policy with respect to employer-employee relationships, and in so doing is free from any judicial inquiry as to any asserted invasion of constitutional rights, and if the executive branch may do all this without legislative sanction, then obviously the executive branch of the Government is supreme, and the legislative branch of the Government could not in any way take away or limit the powers of the executive branch. Likewise the executive branch could, acting under the same claim of all-inclusive and unlimited war powers, prorogue the courts themselves. Such possibility is by no means imaginary. In the saboteurs case[9] the President's order expressly denied access to the courts, and while this court held that such denial could not prevent a recourse to the courts to determine questions of jurisdiction and ques-

9. *Ex Parte Quirin*, 317 U. S. 1.

tions of constitutional right, it is not wholly improbable that the executive branch of the Government, in order to prevent judicial inquiry as to the constitutionality of its acts in time of war, might order the functions of the judicial branch to be suspended so long as the war shall continue. As a matter of fact the claims advanced by the executive branch of the Government as to the extent of its "war powers" knows, and can know, no limit. What does one think was meant by the statement of the Board in its opinion in the *Little Steel* case that as "Commander-in-Chief in time of war the President's authority extends not only to matters of strictly military nature, or to problems directly related to military activities, but also to whatever phases of civilian life must be controlled in order to prosecute the war successfully."[10] And of course implicit in

10. Among others, the following excerpts from the Board's opinion in the *Little Steel* case are illuminating:

"The National War Labor Board was created through the exercise of the President's war power. Hence the jurisdictional powers and duties of the Board stem directly from the war powers of the President." (1 W. L. R. at p. 350.)

"The objections to the jurisdiction of the Board overlook the fact that there is inherent in the war powers of the President the authority to take such steps as may be necessary to prevent and settle labor disputes which threaten to disrupt the successful prosecution of the war." (1 W. L. R. at p. 350.)

"It is immaterial that the issues involved in the dispute are over wages and union security. It is immaterial that in peacetime the parties might conceivably be justified in raising some legal objection to the enforcement of an arbitration award of which they do not approve. In wartime there is no basis for questioning the power of the President to order what amounts to compulsory arbitration for the settlement of any labor dispute such as the instant one which threatens the war effort. The President, having entrusted this duty to the National War Labor Board, it follows that those who challenge a decision of the Board challenge the war powers of the President." (1 W. L. R. at p. 351.)

"In view of the vital importance of the steel industry to the successful prosecution of the war, it is only fair to make clear to the parties concerned in this dispute that any attempt on their part to stay the carrying out of this decision must be construed by the Board as a challenge to the war powers of the President. In such event the Board will not hesitate to recommend that the war powers be exercised to whatever degree may be necessary to meet successfully such a challenge." (1 W. L. R. at p. 358.)

In the *Vanadium* case, 13 W. L. R. 527, the Board stated explicitly that in exercising its powers of compulsory arbitration in the settlement of labor disputes it was not circumscribed in any way by the War Labor Disputes Act. And such was the general effect of the position taken by Mr. Davis, Mr. Morse, and the Attorney General in their testimony before the respective committees of the House heretofore referred to.

that statement is the theory that the President's decision as to what must be controlled in order to prosecute the war successfully is conclusive.

The saboteurs case and the Japanese cases are wholly opposed to any such theory of government. Nevertheless, by its judgment in the instant case, and others, the court below has put into practical operation the theory of government thus asserted by the executive branch thereof.

In the Japanese cases executive action ultimately found, and had to find, its support in Acts of Congress. And in those cases it is to be noted that opportunity was afforded to the citizens involved to have their constitutional rights passed upon.

That is all that Petitioner is seeking in the instant case —an opportunity to have the judicial branch of the Government determine its claim of constitutional privilege, and to determine whether it may be required by executive fiat to violate applicable Acts of Congress.

That such questions are of vast importance appears, first, from the fact that "compulsory arbitration" has been held to be unconstitutional in peacetime by this Court. (*Wolff Packing Co.* v. *Industrial Relations Co.*, 262 U. S. 522.) Whether the Congress, in time of war, can provide for the compulsory arbitration of labor disputes is not before the Court at this time inasmuch as no claim is made that the Board's order here involved is supported by the War Labor Disputes Act. Here we have an attempt by the Government acting through its Executive Branch, alone, to provide for compulsory arbitration. In the second place, the decision of this Court in the *Wallace* and *Richwood* cases, Nos. 66 and 67, this term, decided on December 18, 1944, ____ U. S. ____, would seem to dispose of any contention that a provision for maintenance of membership and check-off can be imposed upon an employer as against

the explicit provisions of the National Labor Relations Act.

4. This Court should further review the question as to the sufficiency of the Garrison affidavit. The question is of importance in Federal procedure under Rule 56 relating to motions for summary judgment. In the *Motor Carriers* case where the affidavit was substantially, if we understand it correctly, the same as the affidavit in the instant case, the court below said that the Director of Economic Stabilization "has stated in a letter to the Board" that Order 9370 applied only to Board orders issued under the War Labor Disputes Act. (143 Fed. (2d) 145, at p. 150.) This is not an accurate statement of the Vinson letter.

In the *Ward* case affidavits were filed by both Mr. Garrison and Mr. Vinson. They are not at all of the same character as the affidavit filed by Mr. Garrison in the instant case.

In its complaint herein Petitioner alleged that the Director of Economic Stabilization and other agencies were about to or had taken action to impose sanctions pursuant to said Order 9370. That allegation, notwithstanding the characterization thereof by the court below as a mere prediction (R. 99), is not denied by Respondents, but on the contrary stands admitted by their motion to dismiss. The Garrison affidavit wholly fails to meet the requirements of Rule 56. If, upon an issue as important as that raised by Petitioner's complaint, the trial court can grant summary judgment upon the strength of such an affidavit as that filed herein by Respondents, the whole purpose of Rule 56 is defeated. Respondents saw fit to file their respective motions prior to answer, as, of course, they had the right to do, Rule 56(b), and we therefore do not have a denial of the allegation in question by any responsive plead-

ing of the Respondents. This court should determine the sufficiency of the allegations in the complaint in such regard, and the sufficiency of the Garrison affidavit. In *Walling* v. *Fairmount Creamery Co.*, C. C. A. 8, 139 Fed. (2d) 318, the court held that "conclusory" affidavits are insufficient upon a motion for summary judgment. The court below in the instant case seems to hold that a conclusory affidavit is sufficient.

5. The court should further review this case to determine whether or not the suit was in effect one against the United States. As pointed out, the court below, by retaining the case sufficiently to express an opinion with regard to the nature of the Board's orders, seems to regard the suit properly brought as against the specific objection in question. And in the *Motor Carriers* case the court below determined the question from the standpoint of whether there was general equitable jurisdiction to enjoin the action of an administrative body rather than from the standpoint as to whether the suit was against the United States. Nevertheless in its opinion it discusses many of the cases against administrative officers in which the question was considered as to whether the suit was against the United States. The holding below was, generally, that the case was not one where an action would lie. (143 Fed. (2d) 145, at p. 147.) And the fact remains that Petitioner's complaint is now to be dismissed. The result, we submit, is contrary to the decision of this court in *Stark* v. *Wickard*, 321 U. S. 288, although the court below gave apparent recognition to that decision. In that case a statute was involved. Here Respondents claim to be acting wholly apart from Statute. There is even more reason for judicial review.

A somewhat comparable situation was involved in *Utah Fuel Co.* v. *Coal Commission*, 306 U. S. 56. There the suit

was against the Coal Commission and although the District Court dismissed the bill on the merits the court below affirmed the dismissal on the ground that the District Court had no jurisdiction. This court granted certiorari and held that the District Court did have jurisdiction although that court properly dismissed the suit upon its merits. If certiorari was allowable in that case, it should be allowed here.

In the case last cited the District Court had passed upon the substantive questions involved in the suit, and therefore when this court agreed with the District Court's disposition of those questions it was proper to affirm the District Court judgment. In the instant case the District Court has been given no opportunity of passing upon the questions submitted to it by Petitioner's complaint, and we therefore assume that the proper order here, if certiorari is granted, is to reverse the court below and send the case back to the District Court for trial.

The procedure followed in the instant case by the court below is not conducive to orderly litigation or to the expeditious disposition of lawsuits. Nor is it within the spirit and intendment of the Rules of Civil Procedure. After the District Court overruled Respondent's motions to dismiss and for summary judgment they obtained leave to prosecute a special appeal to the court below under special provisions of the District of Columbia Code. And upon that appeal the District Court was reversed, as has been heretofore shown. It would have seemed only proper that if the court below had thought there was jurisdiction in the District Court as against the objection that the suit was against the United States or did not involve a "controversy", it would have let the District Court proceed with a trial of the issues involved rather than to short-cut the proceedings

merely upon the inconclusive view that the Board's order was essentially "advisory" only, coupled with an order for the dismissal of Petitioner's complaint. Only upon the theory that Petitioner's complaint stated no claim or cause of action and was not capable of amendment was the court justified in dismissing the complaint. The practice followed by the court below in this regard should not be condoned by this court and certiorari should be granted so that proper practice can be directed. The result of the decision of the court below is to peremptorily and summarily put the Petitioner out of court in the face of threatened action by Respondents—even granting for the sake of argument that the Board's order was "advisory" in its fullest literal sense—without even an opportunity to amend its complaint in any respect whatsoever. Even if it were thought that the allegations of the complaint were insufficient in the respects noted by the court below, there should be some opportunity to amend. See Rule 15. Cf. Rule 8 (f).

The authority is almost overwhelming in the lower federal courts that motions to dismiss are not to be lightly granted, and that before final judgment goes against the plaintiff as a matter of pleading it must reasonably appear that he has no claim or cause of action which can be stated in any form. The new Rules of Civil Procedure simply require that plaintiff state the nature of his claim. (Rule 8.) The rules do not require that evidentiary matters be pleaded, and certainly we know of no more specific allegations of threatened action than those set out in the complaint herein. The court below brushes aside all of these allegations with the cursory holding that the order itself is advisory, just as if a specific threatened enforcement of an advisory order does not entitle a plaintiff to judicial relief.

Summary.

The judgment of this Court as to whether the Board's order amounts to "compulsory arbitration" or is "advisory" only, or, if "advisory" only, is enforcible by "executive action", or, whether if "advisory" only, an employer may still be threatened with its enforcement has become, because of the public importance of the matter involved, a plain necessity without further delay, in order to prevent other protracted litigation, and in order to clarify the situation so that the private citizen may have an authoritative understanding of his relationship with his Government. We are engaged in a war which even now has resulted in untold and immeasurable destruction of human life and property. Even though this Court has consistently adhered, and is now adhering in its most recent decisions, to the position that even in times of war the United States Constitution is a living and continuing charter of liberty, the refusal by a co-ordinate branch of the Government to observe with meticulous care the rights of a private citizen, even in time of war, is a matter of deep concern to the people at large.

In *Ex parte Mitsuye Endo*, No. 70, this term, ... U. S. ....., decided December 18, 1944, this court said that it must assume "that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen." That in interpreting a wartime measure it "must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war." And that this court "must assume, when asked to find implied powers in a grant of legislative or executive authority, that the lawmakers intended to place no greater restraint on the citizen than was clearly and unmistakably indi-

cated by the language they used." This court also referred to the provisions of the Constitution (including there the Fifth and Sixth Amendments), saying that they were mentioned to "indicate the approach which we think should be made to an Act of Congress or an order of the Chief Executive that touches the sensitive area of rights specifically guaranteed by the Constitution." There has been in the instant case, by the entry of the Board's order and its threatened enforcement against Petitioner, with the denial of any opportunity to it to have determined its right of constitutional privilege, no sensitive regard for or respect shown for the liberties of the citizen. Can or will this court, in view of the view expressed above, condone or approve the action of the court below in shutting the judicial door in Petitioner's face in its efforts to have its claim of constitutional privilege determined by the courts, and, if in truth, the Board's order lacks binding effect, or is advisory in its fullest legal sense, thereby preventing Petitioner from obtaining judicial relief against the unlawful and illegal threatened enforcement of an order which, in that or any event, it is not required to obey. To correct such a situation the supervisory power of this court over the proceedings of the courts below should be exercised by granting certiorari herein as prayed.

When a controversy exists—and particularly as between the private citizen and his Government—it is vital that the Judicial Branch of the Government, which is the particular branch constituted to determine and decide controversies, should exercise its prerogative to the end that the citizen may know in his dealings with his Government what he may do and may not do, and that the Government itself, or its administrative officials, in its, or their, dealings with a citizen, may know what it, or they, may do or may not do.

It is unfortunate that the District Court was not given an opportunity to pass upon the merits of the substantive questions involved. Had it been permitted to do so, then this Court, as in the *Coal* case,[11] would have been in a position to dispose of the entire controversy once and for all. Technically, this Court might conceive it necessary to send the case back to the District Court for initial disposition there. On the other hand, in the exercise of its broad supervisory powers and in its right to grant certiorari even prior to final judgment, we think it would only be commensurate with justice and in the public interest for this Court to deal with the case, if certiorari is granted, as if the substantive questions were before it for decision.

WHEREFORE, your Petitioner prays that a writ of certiorari issue under the seal of this court directed to the United States Court of Appeals for the District of Columbia, commanding that court to certify and send to this court a full and complete transcript of the record and of all proceedings before it in the case numbered and entitled on its docket No. 8695, *National War Labor Board, et al., Appellants*, v. *United States Gypsum Company*, a corporation, Appellee, to the end that such cause may be reviewed and determined by this court as provided by law.

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11. *Utah Fuel Co.* v. *Coal Commission*, 306 U. S. 56.